Chapter 12: Trials

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Appendix: Child Protection Jury Instructions, Judge Donald S. Owens, Michigan Court of Appeals, May 1, 2003

In this chapter. . .

This chapter outlines the procedures for conducting a jury or bench trial in a child protective proceeding. It contains discussion of the purpose of a trial, time requirements, the standard of proof, and jury procedures. A complete set of jury instructions is attached as an appendix to this chapter. Also included in this chapter are the standards and procedures for granting or denying directed verdicts and motions for new trial or rehearing.

12.1 Trials in Child Protective Proceedings

In the context of a child protective proceeding, a "trial" is "the fact-finding adjudication of an authorized petition* to determine if the minor comes within the jurisdiction of the court." MCR 3.903(A)(26). Child protective proceedings are civil, not criminal, proceedings. MCL 712A.1(2).

*See Section 7.11 for a discussion of authorization for filing of petitions.

The court may conduct the trial in an informal manner. MCL 712A.17(1). Unless waived, the court must read the allegations in the petition at the beginning of a trial. MCR 3.972(B)(2).

If the factfinder concludes that the child is not within the jurisdiction of the court, the court must dismiss the petition. MCL 712A.18(1) and *In re Mathers,* 371 Mich 516, 531–32 (1963).

If the factfinder concludes that the child is within the jurisdiction of the court, the court will enter an order of disposition. It may:

*See Section 13.9.

- order one or more of the dispositional alternatives contained in MCL 712A.18(1)* that are appropriate for the welfare of the child and society in view of the facts proven and ascertained, and

*See also Sections 7.14 and 13.10 for discussion of the court's authority over "nonparent adults."

- make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of the child or children under its jurisdiction. MCL 712A.6. The authority to fashion remedies under MCL 712A.6 extends beyond MCL 712A.18. *In re Macomber,* 436 Mich 386, 389–93, 398–400 (1990).*

Following adjudication, court takes jurisdiction over child, not parent. The court's jurisdiction is "tied to the children," and a petitioner is not required to "sustain the burden of proof at an adjudication with respect to every parent of the children involved in a protective proceeding before [it] can act in its dispositional capacity." *In re CR,* 250 Mich App 185, 205 (2002).

12.2 Time Requirements

The time requirements for trials in child protective proceedings are contained in MCR 3.972(A), which states as follows:

*See Section 5.12 for discussion of this court rule.

> "(A) *Time.* If the child is not in placement, the trial must be held within 6 months after the filing of the petition unless adjourned for good cause under MCR 3.923(G).* If the child is in placement, the trial must commence as soon as possible, but not later than 63 days after the child is placed by the court unless the trial is postponed:
>
> (1) on stipulation of the parties;
>
> (2) because process cannot be completed; or
>
> (3) because the court finds that the testimony of a presently unavailable witness is needed.
>
> "When trial is postponed pursuant to subrule (2) or (3), the court shall release the child to the parent, guardian, or legal custodian unless the court finds that releasing the child to the custody of the parent, guardian, or legal custodian will likely result in physical harm or serious emotional damage to the child."

MCR 3.973(B), which governs notice of dispositional hearings, contemplates a combined adjudicative and dispositional hearing. That rule

states that "[u]nless the dispositional hearing is held immediately after the trial, notice of hearing may be given by scheduling it on the record in the presence of the parties or in accordance with MCR 3.920." Moreover, MCR 3.973(C) assigns to the court's discretion the interval between a trial and dispositional hearing (though not to exceed 35 days when a child is in placement). Thus, the two hearings may be combined if necessary preparations are completed prior to the hearing. Most importantly, a Case Service Plan must be prepared prior to the hearing. See MCR 3.973(E)(2).

12.3 Parties Who May Be Present at Trial

Before proceeding, the court must determine that the proper parties are present. MCR 3.972(B)(1). "The respondent has the right to be present, but the court may proceed in the absence of the respondent provided notice has been served on the respondent. The child may be excused as the court determines the child's interests require." MCR 3.972(B)(1). MCL 712A.12 states that ". . . the court in its discretion may excuse but not restrict children from attending the hearing."

A member of a local Foster Care Review Board must be admitted to a trial. MCL 712A.17(6).

12.4 Rules of Evidence and Standard of Proof

MCR 3.972(C)(1) states as follows:

> "(1) *Evidence; Standard of Proof.* Except as otherwise provided in these rules, the rules of evidence for a civil proceeding and the standard of proof by a preponderance of evidence apply at the trial, notwithstanding that the petition contains a request to terminate parental rights."

The standard of proof required to terminate parental rights is "clear and convincing evidence," or, if an Indian child is the subject of the proceedings, "beyond a reasonable doubt."

12.5 Jury Procedures

Juries in child protective proceedings consist of six jurors. MCL 712A.17(2). Alternate jurors may be impaneled and may deliberate pursuant to MCR 2.511(B) and 2.512(A)(3). Prospective jurors must be summoned and impaneled in accordance with MCL 600.1376 et seq.

Jury procedures in child protective proceedings are governed by MCR 2.508–2.516 (civil cases), except as provided in MCR 3.911(C)(2), which states:

> "(2) In a child protective proceeding,
>
> > (a) each party is entitled to 5 peremptory challenges, with the child considered a separate party, and
> >
> > (b) a verdict in a case tried by 6 jurors will be received when 5 jurors agree."

The applicable jury procedure rules are as follows:

- MCR 2.508 Jury Trial of Right
- MCR 2.509 Trial by Jury or Trial by Court
- MCR 2.510 Juror Personal History Questionnaire
- MCR 2.511 Impaneling the Jury
- MCR 2.512 Rendering Verdict
- MCR 2.513 View
- MCR 2.514 Special Verdicts
- MCR 2.515 Motion for Directed Verdict
- MCR 2.516 Instructions to Jury

Peremptory challenges. MCR 3.911(C)(2)(a) states that "each party is entitled to 5 peremptory challenges, with the child considered a separate party. . ." However, MCR 3.911(C)(3) qualifies this as follows:

> "(3) Two or more parties on the same side, other than a child in a child protective proceeding, are considered a single party for the purpose of peremptory challenges.
>
> > (a) When two or more parties are aligned on the same side and have adverse interests, the court shall allow each such party represented by a different attorney 3 peremptory challenges.
> >
> > (b) When multiple parties are allowed more than 5 peremptory challenges under this subrule, the court may allow the opposite side a total number of peremptory challenges not to exceed the number allowed to the multiple parties."

Thus, for example, if each of two respondents presents claims adverse to the other and is represented by a different attorney, each should be allowed three peremptory challenges, and the child and petitioner should be allotted six peremptory challenges each.

12.6 Jury Instructions

MCR 2.516(D) governs the creation, modification, and use of Model Civil Jury Instructions. In 1998, the Standard Civil Jury Instructions Committee (now the Model Civil Jury Instructions Committee) created standard jury instructions for child protective proceedings. See M Civ JI 97.01–97.15. MCR 2.516(D)(4) states:

> "This subrule does not limit the power of the court to give additional instructions on applicable law not covered by the model instructions. Additional instructions when given must be patterned as nearly as practicable after the style of the model instructions, and must be concise, understandable, conversational, unslanted, and nonargumentative."

Included as an Appendix to this chapter are jury instructions for child protective proceedings created by Honorable Donald S. Owens, Judge, Michigan Court of Appeals.

12.7 Lawyer-Guardian ad Litem Recommendation

MCR 3.972(D) allows a child's lawyer-guardian ad litem to make a recommendation to the factfinder regarding whether a jurisdictional basis has been established. That rule states:

> "(D) *Recommendation by Lawyer-Guardian ad Litem.* At the conclusion of the proofs, the lawyer-guardian ad litem for the child may make a recommendation to the finder of fact regarding whether one or more of the statutory grounds alleged in the petition have been proven."

12.8 Motions for Directed Verdict in Jury Trials

MCR 2.515 allows for a motion for directed verdict to be made at the close of the evidence offered by the opponent. Because the petitioner has the burden of proof, a respondent may move for a directed verdict at the close of the petitioner's proofs, or a respondent may wait until all of the proofs have been presented. See M Civ JI 97.03–97.04, and *In re Taurus F,* 415

Mich 512 (1982) (petitioner has burden of proving that a child falls within the jurisdiction of the court). The motion must be supported by specific grounds. If the motion is denied, the moving party may offer evidence without having reserved the right to do so. Denial of a motion for directed verdict does not constitute waiver of trial by jury. MCR 2.515.

The judge may grant a motion for directed verdict only "when the evidence does not establish a prima facie case and reasonable persons would agree that there is an essential failure of proof." *Auto Club Ins Assoc v General Motors Corp,* 217 Mich App 594, 601 (1996). The evidence and all legitimate inferences that may be drawn from it must be viewed in a light most favorable to the nonmoving party. *Caldwell v Fox,* 394 Mich 401, 407 (1975).

12.9 Taking the Verdict in Jury Trials

MCR 3.911(C)(2)(b) states that a verdict in a case tried by six jurors will be received when five jurors agree. A party may require the jury to be polled. If the number of jurors agreeing is less than required, the jury must be sent out for further deliberation. MCR 2.512(B)(2)–(3) and *People v Bufkin,* 168 Mich App 615, 617 (1988). The court may discharge a jury:

> "(1) because of an accident or calamity requiring it;
>
> "(2) by consent of all the parties;
>
> "(3) whenever an adjournment or mistrial is declared;
>
> "(4) whenever the jurors have deliberated until it appears that they cannot agree.
>
> "The court may order another jury to be drawn, and the same proceedings may be had before the new jury as might have been had before the jury discharged." MCR 2.512(C)(1)–(4).

12.10 Court's Authority to Call Additional Witnesses

The court has authority to call or examine witnesses and to order production of additional evidence or witnesses. MCR 3.923(A)(1) states:

> "(A) *Additional Evidence.* If at any time the court believes that the evidence has not been fully developed, it may:
>
> (1) examine a witness,

(2) call a witness, or

(3) adjourn the matter before the court, and

(a) cause service of process on additional witnesses, or

(b) order production of other evidence."

See *In re Alton,* 203 Mich App 405, 407–08 (1994) (in a delinquency proceeding, the court properly allowed additional testimony that directly addressed key conflicts between the testimony of the complainant and juvenile).

12.11 Findings of Fact and Conclusions of Law by Judge or Referee

Subchapter 3.900 of the Michigan Court Rules does not have a specific court rule dealing with findings of fact and conclusions of law by a judge or referee in a nonjury trial. Nor is MCR 2.517, the rule governing civil bench trials, applicable to proceedings under Subchapter 3.900. However, MCR 3.977(H), which sets forth the requirements for findings and conclusions following hearings on the termination of parental rights, may be helpful. That rule states, in relevant part:

"(H) **Findings.**

"(1) *General.* The court shall state on the record or in writing its findings of fact and conclusions of law. Brief, definite, and pertinent findings and conclusions on contested matters are sufficient. . . .

"(2) *Denial of Termination.* If the court finds that the parental rights of respondent should not be terminated, the court must make findings of fact and conclusions of law.

"(3) *Order of Termination.* An order terminating parental rights under the Juvenile Code may not be entered unless the court makes findings of fact, states its conclusions of law, and includes the statutory basis for the order."

MCL 712A.10(1)(c) states that a referee must "make a written signed report to the judge . . . containing a summary of the testimony taken and a recommendation for the court's findings . . . ."*

*See Chapter 15 (review of referee's recommended findings and conclusions).

12.12 Records of Proceedings at Adjudicative Hearings

MCR 3.925(B) states that "[a] record of all hearings must be made. All proceedings on the formal calendar must be recorded by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108."

12.13 Motions for Rehearing or New Trial

In a child protective proceeding, a party may seek a rehearing or new trial by filing a written motion stating the basis for the relief sought. MCR 3.992(A). MCL 712A.21 allows a petition for rehearing to be filed by "an interested person," which includes a member of a local foster care review board. MCL 712A.21(3). "A motion will not be considered unless it presents a matter not previously presented to the court, or presented but not previously considered by the court, which, if true, would cause the court to reconsider the case." MCR 3.992(A).

A. Standards for Granting Relief

MCR 3.992(A) does not state the standard for granting relief following a court's consideration of a party's motion for rehearing. *In re Alton,* 203 Mich App 405, 409 (1994). However, MCR 2.613(A), the "harmless error rule" for civil proceedings, applies to child protective proceedings. MCR 3.902(A). The "harmless error rule" states that "[a]n error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice."

In *In re Alton, supra,* at 409–10, the Court of Appeals remanded the case to the juvenile court for a rehearing on the juvenile's motion for a new trial. In doing so, the Court adopted the following guidelines for ruling on such motions:

> "In ruling on the motion, the parties and the trial court applied the rules for granting a new trial embodied in MCR 2.611(A)(1). That court rule is not applicable in juvenile delinquency proceedings. See MCR 5.901(B). Therefore, we remand this case for the trial court to reconsider the juvenile's motion under the proper standard of review: whether, in light of the new evidence presented, it appears to the trial court that a failure to grant the juvenile a new trial would be inconsistent with substantial justice. MCR 2.613(A). In this case, that means the trial court must decide whether it appears that if the court refuses to grant

> the motion, it will be exercising jurisdiction over a juvenile who is not properly within its jurisdiction. The trial court must state the reasons for its decision on the record or in writing. MCR 5.992(E)." (Footnote omitted.)

In *In re Ayres,* 239 Mich App 8, 23–24 (1999), the Court of Appeals applied the standard applied in criminal cases when deciding whether to grant a new trial on the ground that the verdict was against the great weight of the evidence. A court may grant such a motion "only if the evidence preponderates heavily against the verdict so that a miscarriage of justice would result from allowing the verdict to stand. *People v Lemmon,* 456 Mich 625, 642; 576 NW 2d 129 (1998). The trial judge is not allowed to sit as the 'thirteenth' juror and grant a new trial on the basis of a disagreement with the jurors assessment of credibility. *Id.* at 647." *Ayres, supra.* In *Ayres,* the Court of Appeals held that inconsistencies in the witnesses' testimony did not require reversal of the jury's verdict, where the inconsistencies resulted from the witnesses' age (from four to six years), and the charged offenses occurred about six months before trial. *Id.* at 24–25.

B. Procedural Requirements

Time requirements for filing motions and responses. The written motion stating the basis for the relief sought must be filed "within 21 days after the date of the order resulting from the hearing or trial. The court may entertain an untimely motion for good cause shown." MCR 3.992(A).

Any response by parties to a motion for rehearing or new trial must be in writing and filed with the court and served on opposing parties within seven days after notice of the motion. MCR 3.992(C).

Notice requirements. MCR 3.992(B) states that all parties must be given notice of the motion in accordance with MCR 3.920.*

*See Sections 5.4–5.5.

No hearing required. MCR 3.992(E) provides that the court need not hold a hearing for a ruling on a motion for rehearing or new trial. "Any hearing conducted shall be in accordance with the rules for dispositional hearings and, at the discretion of the court, may be assigned to the person who conducted the hearing."*

*See Section 13.5 for a discussion of the applicable evidentiary rules.

Stay of proceedings. MCR 3.992(F) provides that the court may stay any order pending a ruling on a motion for rehearing or new trial.

Findings by court. The court shall state the reasons for its decision on the record or in writing. MCR 3.992(E).

C. Remedies

MCR 3.992(D) states that "[t]he judge may affirm, modify, or vacate the decision previously made in whole or in part, on the basis of the record, the memoranda prepared, or a hearing on the motion, whichever the court in its discretion finds appropriate for the case." The court may enter an order for supplemental disposition while the child remains under the court's jurisdiction. MCL 712A.21(1).